RECORD AND BRIEFS

FILED
NOV - 2 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,
Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF *AMICI CURIAE* AMERICAN FARM BUREAU FEDERATION AND SOUTH DAKOTA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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November 2, 2017

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INTEREST OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT[1]

Amicus American Farm Bureau Federation is a voluntary general farm organization established in 1919 to protect, promote and represent the business, economic, social and educational interests of American farmers and ranchers. AFBF has member organizations in 50 States and Puerto Rico, representing nearly six million member families. Its mission is to enhance and strengthen the lives of rural Americans and to build strong, prosperous agricultural communities.

Amicus South Dakota Farm Bureau Federation is a grassroots membership organization established in 1917 and dedicated to representing, upholding and improving South Dakota's agricultural industry. It represents more than 16,000 farm, ranch and rural member families across South Dakota. SDFBF is a member of AFBF.

Amici file this brief to explain why the question presented in this case is particularly crucial to the future of America's rural and agricultural communities.

This case offers a golden opportunity for this Court to jettison the long-outdated rule of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), which prevents States from collecting sales tax from retailers who lack an in-state physical presence. To be sure, *Quill* "inflict[s] extreme harm and unfairness on the States" and results in "a startling revenue shortfall." *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1134–35 (2015) (Kennedy, J., concurring). That (along with its many doctrinal flaws) is reason enough for *Quill* to go. But it is far from its only

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

evil. By unfairly hampering the ability of brick-and-mortar stores to compete on a level playing field with their online counterparts, *Quill* inflicts a variety of economic and social harms on the fabric of America's rural communities.

The stores that line the streets of our small and rural towns offer essential goods and services to the farmers and ranchers who work in the fields that surround them. Farmers depend on local stores not only for convenience but also to support their families, provide jobs, generate tax revenue, and give vibrancy to community life. But hometown businesses are at a distinct disadvantage when they compete with online-only retailers who don't have to collect sales tax.

When a family-owned grocery, drugstore, or gift shop is forced to shutter its doors after generations of serving a town's citizens, it does not merely represent the loss of one business. It also often means another empty storefront in an already struggling downtown, the loss of jobs (including off-farm jobs of family farmers and their spouses), and less foot traffic for the neighboring shops. It also inevitably means less revenue for critical public services, such as emergency responders, law enforcement, and educators.

Of course, a decision to retire *Quill* won't solve all of rural Main Street's problems. But it would at least foster a more level playing field between large internet retailers and local stores, thereby protecting not only sales-tax revenue but jobs and a sense of community. And it would encourage new jobs, by eliminating a rule that perversely discourages out-of-state companies from investing in rural communities for fear that warehouses or manufacturing facilities will trigger the physical-presence threshold. For all these reasons, this Court

should grant certiorari and put an end to *Quill*'s unfair and harmful regime.

ARGUMENT

QUILL'S PHYSICAL-PRESENCE REQUIREMENT UNFAIRLY HARMS RURAL COMMUNITIES.

This case presents the Court with an ideal opportunity to reconsider and overrule the outdated and doctrinally dubious physical-presence requirement of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). The petition for certiorari persuasively explains why *Quill*'s continued vitality presents an exceptionally important question and why this Court's review is warranted now: The physical-presence requirement robs state and local governments of hundreds of billions of dollars in revenue, disadvantages brick-and-mortar businesses by subsidizing their internet-only competitors, and inexplicably discriminates against interstate commerce itself. Pet. 12–20. To the list of harms, this brief adds one more: the particular harm that *Quill* inflicts on rural communities.

Numerous empirical studies show that *Quill* has a pronounced anticompetitive impact, affecting both consumer and retailer behavior.[2] When a retailer collects sales tax, "a natural customer reaction is to look for similar products at competing retailers that do not charge sales taxes," and the studies show that consumers do precisely that, taking their business online.[3] Freedom from the obligation to pay sales taxes thus confers a significant competitive advantage on online retailers over

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[2] *See, e.g.*, Eric T. Anderson, et al., *How Sales Taxes Affect Consumer and Firm Behavior: The Role of Search and the Internet*, 47 *Journal of Marketing Research* 299 (April 2010); Austan Goolsbee, *In a World Without Borders: The Impact of Taxes and Interstate Commerce*, 115 Q. J. Econ. 561 (2000).

[3] Anderson, et al. at 235.

brick-and-mortar stores, even after adjusting for all other variables.[4] In effect, *Quill* confers a subsidy on out-of-state retailers—including the nation's largest internet businesses, which already benefit from huge economies of scale, lower rent and labor costs, and increased consolidation and market dominance.[5] The result is that price-sensitive consumers take their business away from local brick-and-mortar stores, which often cannot lower their prices enough to be competitive. This diversion of business to online retailers forces local governments in some cases to try to make up for lost tax revenue by increasing property taxes—a burden that falls heavily on land-based business owners like farmers and ranchers. And studies show that internet retailers, aware of the need to maintain their competitive advantage, take pains to avoid locating warehouses where doing so could trigger the physical-presence requirement, thereby depriving communities of not only tax revenue but jobs as well.[6]

These harmful consequences are felt acutely in rural communities across America. As jobs in manufacturing and other non-farm industries have dried up, the retail industry has become an increasingly important source of off-farm jobs in rural areas.[7] When brick-and-mortar stores close or scale back, residents have even fewer

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[4] *Id.* at 239.

[5] *See generally* Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017) (discussing Amazon's market dominance and its effects).

[6] *Anderson*, et al. at 239; *see also* Janet Adamy & Paul Overberg, *Rural America Is the New Inner City*, Wall Street Journal, May 26, 2017 (noting that, over the past decade, "Amazon shifted its warehousing strategy," moving warehouses away from rural areas).

[7] Rachel Abrams & Robert Gebeloff, *In Towns Already Hit by Steel Mill Closings, a New Casualty: Retail Jobs*, N.Y. Times, June 25, 2017.

employment options. And online retail is unlikely to fill the void. Rural and small metropolitan areas enjoy only 13 percent of jobs relating to online commerce, compared to 23 percent of brick-and-mortar retail positions.[8]

The economic health of farm communities and the availability of retail jobs can determine whether a family has enough off-farm income to keep the family farm. As one rural economist explains, "[f]arm household well-being is very dependent on rural community prosperity," particularly because "farm households have become more dependent on off-farm income."[9] Hence, the loss of rural retail jobs threatens the viability of many family farms. "A struggling farm economy only highlights the need for non-farm employment opportunities for all farm families."[10] In this way, the fortunes of both smaller and mid-size family farms are closely linked to the local rural economy.

Beyond jobs, local stores provide essential services, convenience, and a sense of community. These stores invest in their neighborhoods and play a major role in the overall quality of life. In rural America, the competitive imbalance in favor of internet commerce is not some abstract concern; it is felt every day by consumers who must choose between their need to manage household expenses and their loyalty to treasured local stores. For example, a customer at Farm and Home—a food and farm supply store in Osceola, Iowa—recently explained that she does most of her shopping on Amazon to save

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[8] *Id.*

[9] Testimony of Bruce Weber, Senior Economist, Rural Policy Research Institute, Before the U.S. Senate, Committee on Agriculture, May 25, 2017, https://goo.gl/oyNGZE.

[10] David Peters, *Income Trends for Iowa Farms and Farm Families, 2003-2015*, SOC 3076 (2016), https://store.extension.iastate.edu/product/14898.

money, despite her desire to "support the local community here," and "shop local."[11] "Our town doesn't have a whole lot, but we need to keep what we have going," she explains. Another customer emphasized the values of both community and convenience: "I favor small town stores and want to keep the town vibrant, growing, and if I want something, I want to be able to just go get it instead of having to wait for it," he said. Yet Farm and Home's owner acknowledges that "younger customers are turning to internet sales more and more, and it's difficult for physical stores like his to compete."[12]

When stores like this end up closing in communities like Osceloa, Iowa, the harms go beyond a loss of convenience and community—they can also eliminate citizens' access to essential goods and services. The departure of a local general store can leave a rural town with no grocery or pharmacy within a *50-mile* radius.[13] This is not uncommon. Rural grocery stores are slowly disappearing across the nation—with a particularly pronounced decline in Midwestern and Great Plains states. In rural Iowa, for example, 43 percent of grocery stores in towns with populations less than 1,000 have closed,[14] and the number of grocery stores across the state

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[11] Michael Dasilva, *Online sales present challenge to traditional brick and mortar businesses*, NC 13 WHTV, Osceola, IA (March 14, 2017), https://goo.gl/oBrQEr (quoting store owner explaining that "younger customers are turning to internet sales more and more, and it's difficult for physical stores like his to compete"); *see also* Joe Cadotte, *Online sales to blame for businesses closing around town*, NewsChannel ABC 20, Springfield, IL (Oct. 11, 2017), https://goo.gl/KiUBrH.

[12] Dasilva, *Online sales present challenge*.

[13] Ethan Wolff-Mann, *The New Way That Walmart Is Ruining America's Small Towns*, Time, Jan. 25, 2016.

[14] David E. Procter, *The Rural Grocery Store Crisis*, Daily Yonder, August 18, 2010, https://goo.gl/b9rpjU.

dropped by almost half from 1995 to 2005.[15] In Kansas, 82 grocery stores in communities of fewer than 2,500 people have closed since 2007, and nearly one in five rural grocery stores has gone out of business since 2006.[16] In total, 38 percent of the 213 groceries in Kansas towns of less than 2,500 closed between 2006 and 2009. As internet retailers expand into the grocery and fresh-market business, rural communities can expect further closures of rural grocery and general stores.

Rural residents are increasingly forced to travel greater and greater distances to purchase basic items for their farms and families. Customers may choose less costly online shopping when they can afford to wait, but they will suffer when they have to drive an hour for milk or a simple pain reliever for a sick child. Thus the loss of local stores accelerates the spiral of local economic decline, as rural life becomes equated with the absence of convenient access to basic goods.

Ironic as it may seem, residents in many rural agricultural areas, no matter their age or income, are increasingly affected by the growing phenomena of rural "food deserts"—areas in which there are no outlets to purchase food despite public and private resources to do so.[17] The Great Plains region has by far the largest concentration of counties in which all the residents of a county are ten or more miles away from a full-service

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[15] Meghan O'Brien, *Small Town Grocers in Iowa: What does the future hold?*, Iowa State University, Regional Capacity Analysis Program (2008), https://goo.gl/8yiGpt.

[16] Procter, *supra* note 6; Kansas State University, Rural Grocery Initiative. http://www.ruralgrocery.org/.

[17] Lois W. Morton, et al., *Iowa Food Security, Insecurity, and Hunger* (2004); Lois W. Morton & Troy C. Blanchard, *Starved for Access: Life in Rural America's Food Deserts*, Rural Realities, Vol. 1 No. 4 (2007).

grocery store—and 98 percent of those counties are rural.[18]

New residents and young families are unlikely to want to live in a community without a place to purchase food. Indeed, in many rural communities, the spiral of economic decline is hard to stop—not just for those families who lose their business, but for the community in general. The loss of a local retailer can have a domino effect, reducing foot-traffic to other shops, movie theaters and restaurants that provide a central point of community for rural families. The younger generations of farm families are also less likely to stay and work on the farm if the local community lacks vitality and retail options.

Quill's impact on local brick-and-mortar stores thus tangibly impacts day-to-day life in rural areas—even more so than in other parts of the country. Local brick-and-mortar retail is the backbone of the many towns, drawing people to live, work, and shop—keeping communities alive. But, under *Quill*, faceless remote sellers, without a physical presence in rural communities or the desire to invest in them, are crippling traditional Main Street retailers and threatening local jobs by taking advantage of this tax loophole.

For a rule designed to vindicate the Constitution's bar on discrimination against interstate commerce, it is beyond strange that *Quill* perversely inflicts so much economic harm on the basis of state boundaries—harm felt most acutely in America's rural agricultural communities. As Justice Gorsuch observed last year, internet retailers don't receive merely "comparable treatment to their in-state brick-and-mortar rivals" under *Quill*, but

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[18] U.S. Department of Agriculture, Food Desert Locator, https://www.fns.usda.gov/tags/food-desert-locator.

instead get "more favorable treatment, a competitive advantage, a sort of judicially sponsored arbitrage opportunity or 'tax shelter.'" *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1150 (10th Cir. 2016) (Gorsuch, J., concurring). It is long since past time to set *Quill* aside.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 2, 2017

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